

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DOUGLAS ALLEN NOGA,)	
)	No. CV-06-275-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR FURTHER
MICHAEL J. ASTRUE, Commissioner)	PROCEEDINGS
of Social Security, ¹)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are Plaintiff's Motion for Summary Judgment (Ct. Rec. 14) and Defendant's Motion for Summary Judgment (Ct. Rec. 17), noted for hearing with oral argument on April 17, 2007. (Ct. Rec. 9.) Attorney Rebecca M. Coufal represents Plaintiff; Special Assistant United States Attorney Joanne E. Dantonio represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 3.) After

¹As of February 12, 2007, Michael J. Astrue succeeded Acting Commissioner Linda S. McMahon as Commissioner of Social Security. Pursuant to FED. R. CIV. P. 25(d)(1), Commissioner Michael J. Astrue should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405(g).

1 reviewing the administrative record and the briefs filed by the
2 parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment
3 and **REMANDS** the matter to the Commissioner for further proceedings.
4 (Ct. Rec. 14.) Defendant's Motion for Summary Judgment is **DENIED**.
5 (Ct. Rec. 17.)

6 **JURISDICTION**

7 Plaintiff applied for Disability Insurance Benefits ("DIB") on
8 April 25, 2005. (Tr. 54.) He alleged disability due to repetitive
9 motion injury in his arms and problems with his knees and back, with
10 an alleged onset date of January 24, 1996. (Tr. 54, 70.) Plaintiff
11 later amended his onset date to January 1, 2004. (Tr. 69.) The
12 application was denied initially (Tr. 30-33) and on reconsideration
13 (Tr. 37-38.) Plaintiff appeared before Administrative Law Judge
14 (ALJ) Mary Bennett Reed on April 20, 2006. The ALJ heard the
15 testimony of Plaintiff, his spouse, and vocational expert Tom
16 Moreland. (Tr. 242-289.) The ALJ issued a decision on May 8, 2006,
17 finding that Plaintiff was not disabled. (Tr. 13-21.) The Appeals
18 Council received additional evidence and denied a request for review
19 on August 23, 2006. (Tr. 5-7.) Therefore, the ALJ's decision
20 became the final decision of the Commissioner, which is appealable
21 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
22 filed this action for judicial review pursuant to 42 U.S.C. § 405(g)
23 on September 22, 2006. (Ct. Rec. 1.)

24 **STATEMENT OF FACTS**

25 The facts have been presented in the administrative hearing
26 transcript, the ALJ's decision, the briefs of both Plaintiff and the
27 Commissioner and will only be summarized here.

28 Plaintiff was 51 years old on the date of the ALJ's decision.

(Tr. 21, 107.) He completed a high-school education and one year of college. (Tr. 76.) Plaintiff has worked as a data entry clerk and as a non-CAD drafter.² (Tr. 21, 71, 81.) He alleges that since his amended disability onset date of January 1, 2004, he has been unable to work due to bad knees, back problems, and repetitive motion injury in his arms. (Tr. 70-71.)

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a Plaintiff is not only unable to do previous work but cannot, considering Plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is

²Plaintiff testified that CAD is "Computer Automated Drafting." (Tr. 284.)

1 engaged in substantial gainful activities. If so, benefits are
2 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
3 the decision maker proceeds to step two, which determines whether
4 Plaintiff has a medically severe impairment or combination of
5 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

6 If Plaintiff does not have a severe impairment or combination
7 of impairments, the disability claim is denied. If the impairment
8 is severe, the evaluation proceeds to the third step, which compares
9 Plaintiff's impairment with a number of listed impairments
10 acknowledged by the Commissioner to be so severe as to preclude
11 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),
12 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the
13 impairment meets or equals one of the listed impairments, Plaintiff
14 is conclusively presumed to be disabled. If the impairment is not
15 one conclusively presumed to be disabling, the evaluation proceeds
16 to the fourth step, which determines whether the impairment prevents
17 Plaintiff from performing work which was performed in the past. If
18 a Plaintiff is able to perform previous work, that Plaintiff is
19 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
20 416.920(a)(4)(iv). At this step, Plaintiff's residual functional
21 capacity ("RFC") assessment is considered. If Plaintiff cannot
22 perform this work, the fifth and final step in the process
23 determines whether Plaintiff is able to perform other work in the
24 national economy in view of Plaintiff's residual functional
25 capacity, age, education and past work experience. 20 C.F.R. §§
26 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137
27 (1987).

28 The initial burden of proof rests upon Plaintiff to establish

1 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
2 v. *Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172
3 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once
4 Plaintiff establishes that a physical or mental impairment prevents
5 the performance of previous work. The burden then shifts, at step
6 five, to the Commissioner to show that (1) Plaintiff can perform
7 other substantial gainful activity, and (2) a "significant number of
8 jobs exist in the national economy" which Plaintiff can perform.
9 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

10 STANDARD OF REVIEW

11 Congress has provided a limited scope of judicial review of a
12 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
13 the Commissioner's decision, made through an ALJ, when the
14 determination is not based on legal error and is supported by
15 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
16 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
17 "The [Commissioner's] determination that a plaintiff is not disabled
18 will be upheld if the findings of fact are supported by substantial
19 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
20 (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a
21 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th
22 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
23 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of*
24 *Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988).
25 Substantial evidence "means such evidence as a reasonable mind might
26 accept as adequate to support a conclusion." *Richardson v. Perales*,
27 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences
28 and conclusions as the [Commissioner] may reasonably draw from the

1 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,
2 293 (9th Cir. 1965). On review, the court considers the record as
3 a whole, not just the evidence supporting the decision of the
4 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)
5 (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

6 It is the role of the trier of fact, not this court, to resolve
7 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
8 supports more than one rational interpretation, the court may not
9 substitute its judgment for that of the Commissioner. *Tackett*, 180
10 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
11 Nevertheless, a decision supported by substantial evidence will
12 still be set aside if the proper legal standards were not applied in
13 weighing the evidence and making the decision. *Browner v. Secretary*
14 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987).
15 Thus, if there is substantial evidence to support the administrative
16 findings, or if there is conflicting evidence that will support a
17 finding of either disability or nondisability, the finding of the
18 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
19 1230 (9th Cir. 1987).

20 **ALJ'S FINDINGS**

21 The ALJ found at the onset that Plaintiff meets the disability
22 requirements set forth in Section 216(I) of the Social Security Act
23 and was insured for disability benefits through December of 2008.
24 (Tr. 13, 15.) The claimant was therefore required to establish
25 disability prior to this date. (Tr. 13.) The ALJ found at step one
26 that Plaintiff has not engaged in substantial gainful activity
27 during any time at issue. (Tr. 15.) At steps two and three, the ALJ
28 found that the medical evidence established that during the relevant

1 time frame, Plaintiff suffered from obesity, degenerative disc
2 disease with minimal change, and hypothyroidism, impairments
3 considered severe but not severe enough, singly or in combination,
4 to meet or medically equal one of the Listings impairments. (Tr.
5 15, 18.) The ALJ found Plaintiff's testimony regarding his
6 limitations not fully credible (Tr. 19-20), and concluded that
7 Plaintiff has the RFC to perform a narrow range of light work. (Tr.
8 20.) At step four, with the assistance of a vocational expert, the
9 ALJ concluded that Plaintiff is able to perform his past work as a
10 data entry clerk and as a non-CAD drafter. (Tr. 20.) Accordingly,
11 the ALJ determined at step four of the sequential evaluation process
12 that Plaintiff was not disabled within the meaning of the Social
13 Security Act. (Tr. 20-21.)

14 ISSUES

15 Plaintiff contends that the Commissioner erred as a matter of
16 law. Specifically, he argues that the ALJ erred when she (1) failed
17 to consider the combined effects of all of his impairments,
18 specifically, obesity and degenerative disc disease; (2) found
19 Plaintiff less than completely credible; and 3) failed to fully
20 develop the record. (Ct. Rec. 15 at 6-11.)

21 The Commissioner opposes the Plaintiff's Motion and asks that
22 the ALJ's decision be affirmed. (Ct. Rec. 18 at 18.)

23 DISCUSSION

24 A. Weighing Medical Evidence

25 In social security proceedings, the claimant must prove the
26 existence of a physical or mental impairment by providing medical
27 evidence consisting of signs, symptoms, and laboratory findings; the
28 claimant's own statement of symptoms alone will not suffice. 20

1 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
2 the basis of a medically determinable impairment which can be shown
3 to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical
4 evidence of an underlying impairment has been shown, medical
5 findings are not required to support the alleged severity of
6 symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).

7 A treating or examining physician's opinion is given more
8 weight than that of a non-examining physician. *Benecke v. Barnhart*,
9 379 F.3d 587, 592 (9th Cir. 2004). If the treating or examining
10 physician's opinions are not contradicted, they can be rejected only
11 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,
12 830 (9th Cir. 1996). If contradicted, the ALJ may reject an opinion
13 if he states specific, legitimate reasons that are supported by
14 substantial evidence. See *Flaten v. Secretary of Health and Human*
15 *Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995).

16 Plaintiff contends that the ALJ failed to consider the combined
17 effects of his impairments, particularly obesity and degenerative
18 disc disease, and "evidence presented at the hearing of his
19 difficulty walking which together can be the basis for a listed
20 impairment." (Ct. Rec. 15 at 6-7.) The Commissioner responds that
21 the ALJ properly weighed the medical evidence, and it does not
22 support a finding that Plaintiff's conditions, either singly or in
23 combination, met or equaled the requirements of the Listings at step
24 three. (Ct. Rec. 18 at 6-7.)

25 In assessing the medical evidence, the ALJ examined the records
26 of Plaintiff's treatment before the onset date of January 1, 2004.
27 The ALJ observes in September of 2001, Frederick Close, M.D., opined
28 after examining Plaintiff that he could return to his job in data

1 entry. (Tr. 19, citing Tr. 131-139.) The ALJ notes that although
2 Dr. Close's report predates the onset date, it is significant with
3 respect to credibility because Plaintiff has continuously asserted
4 that his painful symptoms are disabling. (Tr. 19.) The ALJ points
5 out that there is a gap in the medical record from October of 2003
6 until April of 2005, encompassing the entire 2004 calendar year.
7 (Tr. 19.) The ALJ opines that the complete absence of medical
8 records for more than 18 months calls into question the presence of
9 any disabling impairment. (Tr. 19.)

10 Plaintiff notes that the ALJ did not have the benefit of the
11 physical therapy records provided later to the Appeals Council, and
12 implies that if she had these records, Plaintiff's credibility would
13 be enhanced. The newer records show that Plaintiff began a short
14 regimen of physical therapy on August 5, 2002, and completed it on
15 September 18, 2002. (Tr. 213-214.) Upon completion, Plaintiff's
16 elbow and wrist range of motion were within normal limits, his grip
17 strength had increased, and he reported no pain with gripping. (Tr.
18 214.) In late September of 2003, Plaintiff went camping and slept
19 on a foam pad for four nights, resulting in low back pain. (Tr.
20 190.) He was seen by a physical therapist on October 8, 2003,
21 attended 8 sessions, and ended physical therapy after 8 visits on
22 November 17, 2003, because the goals were achieved. Plaintiff was
23 released to a home exercise program. (Tr. 187.) These records
24 reflect that Plaintiff did not seek medical treatment between
25 November 18, 2003, and April 11, 2005, rather than October of 2003
26 to April 2005, as the ALJ observed. Including the newer records,
27 Plaintiff did not seek medical treatment for about 16 months, rather
28 than 18+ months. The court concludes that this difference is not

1 material because the gap is still substantial. The ALJ's reliance
2 on Plaintiff's lack of medical treatment is a specific and
3 legitimate reason to find Plaintiff less than completely credible.

4 When she weighed the medical evidence, the ALJ also relied on
5 the results of Plaintiff's physical examinations: range of motion
6 testing has been essentially normal, x-rays of claimed affected
7 areas have repeatedly been normal, and there has been no observable
8 muscle wasting or atrophy occurring in the affected areas,
9 signifying continued use of the involved muscle groups. (Tr. 19-20.)

10 The evidence supports the ALJ's conclusions. Before the onset
11 date, x-rays of Plaintiff's right hand, knee and foot were normal.
12 (Tr. 135, 137.) On September 6, 2001, Dr. Close performed an IME.
13 (Tr. 131.) Plaintiff complained of intermittent pain/soreness with
14 over-use of his right hand, elbow and knee. (Tr. 131-132.) Dr. Close
15 found no objective factors of disability; he released Plaintiff to
16 continue his usual job without restriction, although for data entry
17 he recommended a 5 minute rest break every hour. (Tr. 139.) Dr.
18 Close did not recommend surgery or physical therapy, but opined that
19 Plaintiff may continue with nonsteroidal anti-inflammatory
20 medication.³ (Tr. 139.) The ALJ observed that Plaintiff was next
21 seen 7 months later, on April 3, 2002, when he complained that he
22 had experienced severe left low back pain for the past three days.
23 (Tr. 16, citing Tr. 150.) The record shows a short course of
24 medication but no other follow-up or treatment. (Tr. 16.) Plaintiff
25 was seen twice in the ER: on July 12, 2003, for a scorpion bite,

26
27 ³Plaintiff continued to work as a data technician specialist
28 until November 15, 2003. (Tr. 23.)

1 and on July 18, 2003, for chronic intermittent left (not right)
2 shoulder and pectoral pain. (Tr. 140, 144.) Taylor Fletcher, M.D.,
3 notes that Plaintiff's EKG's prior to July 18, 2003, were normal.
4 (Tr. 144.) When Plaintiff gave his medical history, he did not
5 mention knee or back problems. (Tr. 16, citing 144.) According to
6 Dr. Fletcher, Plaintiff is a lifetime nonsmoker; the ALJ incorrectly
7 notes that Plaintiff was reported to be a smoker. (Tr. 16, 144.)
8 As the Commissioner observes, since none of Plaintiff's impairments
9 are related to this mistake, the error is harmless.⁴

10 The ALJ then analyzed the medical records after the date of
11 onset, January 1, 2004, and noted the gap in treatment from October
12 1, 2003, until April 12, 2005. As indicated, this was slightly
13 incorrect because later records showed that Plaintiff sought no
14 medical treatment for about 16, rather than 18+, months. During
15 this gap, Plaintiff and his spouse moved from California to
16 Washington. On April 12, 2005, Plaintiff saw Clayton Kersting,
17 M.D., requesting a disabled parking permit. (Tr. 160.) Plaintiff
18 also asked Dr. Kersting for a letter for his accountant stating that
19 he is disabled; Plaintiff needed this so that he could get a tax
20 deduction after taking money from his pension plan. (Tr. 160.) Dr.
21 Kersting deferred examination, declined writing a letter opining
22

23 ⁴An error is harmless when the correction of that error would
24 not alter the result. See *Johnson v. Shalala*, 60 F.3d 1428, 1436
25 n.9 (9th Cir. 1995). Further, an ALJ's decision will not be reversed
26 for errors that are harmless. *Burch v. Barnhart*, 400 F.3d 676, 679
27 (9th Cir. 2005) (citing *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th
28 Cir. 1991)).

1 Plaintiff was disabled, and gave him a disabled parking permit based
2 on statements that he could not walk 200 feet without significant
3 pain and resting multiple times. (Tr. 160.) Dr. Kersting directed
4 Plaintiff to follow up as needed. (Tr. 160.) The ALJ notes that
5 Plaintiff returned about six months later. (Tr. 17.)

6 The ALJ also considered the results of a July 1, 2005,
7 examination by Robert Rose, M.D., for a disability-ordered
8 consultative examination. (Tr. 17, citing Tr. 161.) Plaintiff
9 weighed 348 pounds and was six feet and one inch tall. (Tr. 162.) He
10 complained of polyarthralgias affecting the lower back, both knees,
11 and pain in the right arm. Plaintiff was able to walk 100-200
12 yards. Sitting and standing were limited to 30 minutes. (Tr. 17,
13 citing Tr. 161.) On examination of the back, spine and extremities,
14 Dr. Rose noted no specific spinous process tenderness, pain behavior
15 or muscle spasm. Plaintiff's shoulders, elbows and wrists exhibited
16 no restriction, crepitation, deformity or erythema; and his hands
17 showed no metacarpal phalangeal or interphalangeal abnormality.
18 Motor strength, both active and resistive, was 4-5/5 in all elements
19 affecting the shoulders, elbows, wrists, hips, knees and ankles.
20 (Tr. 162-163.) Dr. Rose found no subluxation, dislocation or ulnar
21 drift. Plaintiff's hips were without restriction, and the knees
22 showed no swelling or erythema. (Tr. 162.) Dr. Rose found no
23 patellar tendon laxity or joint effusion, noted mild hypertrophy on
24 palpitation, and observed that the knees were stable to varus and
25 valgus stress. (Tr. 162.) The results of drawer signs and
26 McMurray's tests were negative; dorsalis pedis and posterior tibial
27 pulses were symmetrically palpable, and Plaintiff's neurological
28 exam was not revealing. (Tr. 162-163.) Dr. Rose diagnosed exogenous

1 obesity, a co-morbid factor in Plaintiff's knee and back pain
2 complaints, and indicated that there are no current findings of
3 radiographic evaluation. (Tr. 163.) Dr. Rose opined that
4 Plaintiff's co-morbid lumbar pain is most likely attributable to
5 degenerative arthrosis of the lumbosacral spine not associated with
6 evidence of radicular findings; he assessed diminished comparable
7 pinch and grip strength, right compared to left, although two point
8 discrimination is the same. (Tr. 163.) Dr. Rose opined that
9 Plaintiff's ability to handle, grasp and manipulate does not appear
10 to be affected to a significant degree in terms of work-related
11 activities. (Tr. 163.)

12 The ALJ observed that Plaintiff saw Dr. Kersting the second
13 time on October 13, 2005. (Tr. 18, citing Tr. 177.) He again
14 presented with a claim of disability and asked Dr. Kersting to
15 confirm that his condition has worsened since he left California.
16 (Tr. 177.) Dr. Kersting opined that Plaintiff's x-rays "at this time
17 are really pretty benign." He declined opining that Plaintiff was
18 disabled. Dr. Kersting recommended taking nonsteroidal medication
19 as needed, and instructed Plaintiff to follow up as necessary. (Tr.
20 177.)

21 The ALJ notes that on January 31, 2006, Dr. Kersting opined
22 that range of motion testing in both the cervical spine and
23 shoulders had somewhat diminished during the period of September 6,
24 2001, to October 2005. (Tr. 18, citing Tr. 179.) The ALJ points out
25 that this testing is subjective, and Dr. Kersting stated on the same
26 date that Plaintiff's range of motion varies depending on how he
27 feels at the time. (Tr. 18, citing Tr. 179.) Plaintiff took an
28 herbal remedy for his thyroid condition because the prescribed

1 medication did not make him feel any better. Dr. Kersting noted no
2 change in range of motion in Plaintiff's lower back or knees since
3 2001; the ALJ observes that Dr. Kersting makes no reference to
4 tangibly impaired arms, bad knees, or back problems. (Tr. 18, 179.)
5 The ALJ considered Plaintiff's impairments "in combination" and
6 concluded that no Listing impairment is met or equaled; she opined
7 that, but for Plaintiff's obesity, his degenerative disc disease and
8 hypothyroidism are nearer non-severe than severe. (Tr. 18.) No
9 doctor has opined that Plaintiff is disabled. After exhaustively
10 reviewing the record, the ALJ concluded that Plaintiff retains the
11 RFC for a narrow range of light work.

12 **B. Assessing Credibility**

13 Plaintiff contends that the ALJ erred when she weighed
14 credibility. (Ct. Rec. 15 at 7-11). The Commissioner responds that
15 the ALJ's findings are supported by substantial evidence and free of
16 legal error. (Ct. Rec. 18 at 8-17).

17 It is the province of the ALJ to make credibility
18 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
19 1995). However, the ALJ's findings must be supported by specific
20 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
21 1990). Once the claimant produces medical evidence of an underlying
22 impairment, the ALJ may not discredit his testimony as to the
23 severity of an impairment because it is unsupported by medical
24 evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
25 (citation omitted). Absent affirmative evidence of malingering, the
26 ALJ's reasons for rejecting the claimant's testimony must be "clear
27 and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
28 "General findings are insufficient: rather the ALJ must identify

1 what testimony is not credible and what evidence undermines the
2 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*,
3 12 F.3d 915, 918 (9th Cir. 1993). Factors the ALJ may properly
4 consider include claimant's reputation for truthfulness, prior
5 inconsistent statements, unexplained failure to seek medical care or
6 to follow a prescribed course of treatment, and the claimant's
7 activities of daily living. See *Thomas v. Barnhart*, 278 F.3d 947,
8 958-959 (9th Cir. 2002).

9 In this case the ALJ found that Plaintiff suffers from three
10 impairments and there is no evidence of malingering; accordingly,
11 the ALJ's reasons for rejecting Plaintiff's testimony must be clear
12 and convincing. The ALJ found a minimum of five reasons to doubt
13 Plaintiff's credibility: (1) no treating or examining doctor opined
14 that he was unable to work during the relevant period; (2)
15 examinations show normal x-rays, no musculature wasting, and
16 essentially good range of motion and normal neurological results;
17 (3) from October of 2003 to April of 2005, Plaintiff sought no
18 medical treatment; (4) prescription medication has not been taken or
19 recommended, other than for hypothyroidism; and (5) the activities
20 of daily living are not consistent with the severity of impairment
21 alleged. (Tr. 18-20.)

22 The ALJ's finding that the medical evidence did not support
23 Plaintiff's complaints is supported by the record. Perhaps most
24 significantly, no doctor opined that Plaintiff was disabled. Several
25 examining physicians released him to his usual work with no
26 restrictions, other than an hourly five minute rest break when
27 performing data entry. (Tr. 16-20.) The ALJ properly considered
28 this factor when she weighed Plaintiff's credibility.

1 The amount of treatment is an important indicator of the
2 intensity and persistence of a claimant's symptoms. See 20 C.F.R.
3 § 404.1529(c)(3). Plaintiff has asserted that he did not seek
4 medical treatment for financial reasons. (Tr. 20, 127.) The
5 Commissioner counters that on at least two occasions, Plaintiff saw
6 Dr. Kersting to seek confirmation of disability, revealing an
7 ability to pay for medical treatment. The ALJ notes that
8 Plaintiff's alleged financial problems are undermined by his
9 purchase of a home and 21 acres, and continued ownership of horses
10 and a motorcycle that he is unable to use. (Tr. 19.) Even when the
11 physical therapy records (not submitted to the ALJ) are considered,
12 the ALJ's finding that Plaintiff had no medical treatment for
13 substantial periods of time remains substantially correct. The
14 lack of treatment undermines the credibility of Plaintiff's
15 allegedly disabling impairments.

16 Lack of prescription medication is a legitimate factor used to
17 weigh credibility. See *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir.
18 1996). Plaintiff takes nonprescription medication, Tylenol and
19 Aleve. (Tr. 20, 100.) Doctors did not prescribe anything stronger
20 for Plaintiff's pain during the relevant time frame. In October of
21 2005, Dr. Kersting recommended over the counter anti-inflammatory
22 medication. He did not prescribe medication during Plaintiff's
23 visit in January of 2006. (Tr. 179.) The ALJ properly relied on
24 these records when she determined that Plaintiff's use of only over
25 the counter non-prescription medication made his claims of disabling
26 impairments less credible.

27 With respect to daily activities, Plaintiff told Dr. Kersting
28 in April of 2005, 13 months after the alleged onset date, that he

1 planned to work as a gunsmith in a new business in the Newport area.
2 The ALJ observes that this type of work is inconsistent with
3 Plaintiff's claimed hand limitations because gunsmith work requires
4 good bimanual manipulation. (Tr. 17, citing Tr. 160; 20.) On May
5 8, 2005, Plaintiff wrote: "I am capable of preparing all the types
6 of food I desire to eat." (Tr. 95.) Plaintiff indicated that he
7 could drive for an hour at a time. The record reflects that he and
8 his spouse drove from Newport, Washington, to San Diego. (Tr. 20,
9 referring to Tr. 255, 282.)

10 Plaintiff amended his original onset date from 1996 to 2004,
11 after retaining counsel. (Tr. 69.) He alleges that the ALJ
12 improperly relied on this when she assessed his credibility. (Ct.
13 Rec. 15 at 10.) Plaintiff stopped working in November of 2003. (Tr.
14 23.) Plaintiff's counsel has asserted that he may have been
15 confused with respect to the meaning of onset dates. (Tr. 69.) To
16 the extent that the ALJ may have relied on Plaintiff's amended onset
17 date when she weighed his credibility, the error if any is harmless
18 because it would not change the result for the reasons discussed
19 earlier. *See Batson v. Commissioner*, 359 F.3d 1190, 1197 (9th Cir.
20 2004) (applying harmless error rule when assessing an ALJ's
21 credibility findings). Similarly, the ALJ may have erroneously
22 described funds Plaintiff withdrew from a retirement account as
23 savings and as money from selling his home in California. Plaintiff
24 testified: "I cashed out my retirement." (Tr. 260.) He elaborated
25 that "it wasn't retirement because I just quit." (Tr. 267.) At
26 another point, Plaintiff explained: "I cashed out my retirement, we
27 bought the (Washington) property outright, so between that and
28 savings we had put away . . . (and then a few things that we're

1 selling off) . . . right now we're basically living off of that."
2 (Tr. 259-260.) Any error by the ALJ's characterization of the funds
3 is similarly harmless since it would not change the result. See,
4 *Batson*, 359 F.3d at 1197.

5 The next question is whether the ALJ erred when finding that
6 Plaintiff did not change his working conditions or miss work because
7 of his impairments. (Tr. 19.) Plaintiff did not miss work because
8 of his impairments, other than briefly for physical therapy;
9 however, Plaintiff testified that his employer improved the height
10 of his workspace and replaced his computer mouse to make them more
11 ergonomic although "they didn't really change" his job function. He
12 was still required to reach his quotas. (Tr. 263-264.) Based on
13 Plaintiff's unrefuted testimony that his employer changed his
14 working environment because of his impairments, the ALJ erred when
15 finding that Plaintiff's impairments did not affect his working
16 conditions. Because the error may have changed the result, the
17 court cannot say that this error is harmless.

18 The ALJ's credibility assessment was based at least in part on
19 an error which does not appear harmless. Accordingly, the case must
20 be remanded for additional proceedings to correct the legal error.
21 The ALJ rejected the testimony of Plaintiff's spouse, that
22 Plaintiff's arm went bad after he stopped working, he drops and
23 breaks things, and falls down stairs, because it was inconsistent
24 with the medical evidence. (Tr. 20, relying on Tr. 279-280.) On
25 remand the lay testimony should be considered in light of the other
26 evidence.

27 **C. Developing the Record**

28 Plaintiff alleges that the ALJ erred by failing to obtain

1 physical therapy records submitted by his current counsel. (Ct. Rec.
2 15 at 6.) The Commissioner responds that the physical therapy
3 reports considered by the Appeals Council but not by the ALJ would
4 not have changed the ALJ's credibility determination because all
5 examining doctors opined after Plaintiff's physical therapy that he
6 had no work-related limitations and could return to work. (Ct. Rec.
7 18 at 16.)

8 The ALJ's duty to develop the record is triggered by ambiguous
9 or inadequate evidence in the record. *Mayes v. Massanari*, 276 F.3d
10 453, 459-460 (9th Cir. 2001). In this case, error by the ALJ in
11 failing to obtain Plaintiff's physical therapy records is arguably
12 harmless; however, because the matter is remanded for a new
13 credibility determination, the physical therapy records should be
14 considered during further proceedings. The court expresses no
15 opinion as to what the ultimate outcome on remand will or should be.
16 The fact-finder is free to give whatever weight to the additional
17 evidence is deemed appropriate. See *Sample v. Schweiker*, 694 F.2d
18 639, 642 (9th Cir. 1982) ("Q)uestions of credibility and resolution
19 of conflicts in the testimony are functions solely of the
20 Secretary").

21 CONCLUSION

22 Having reviewed the record and the ALJ's conclusions, this
23 court finds that the ALJ's credibility determination is not free of
24 legal error. The case is remanded for further proceedings to
25 reassess the credibility of Plaintiff and of his spouse. The
26 additional evidence available to the Appeals Council but not to the
27 ALJ, Plaintiff's physical therapy records, are part of the record on
28 remand.

1 **IT IS ORDERED:**

2 1. Plaintiff's Motion for Summary Motion (**Ct. Rec. 14**) is
3 **GRANTED.** The matter is remanded to the Commissioner of Social
4 Security for further proceedings consistent with this decision and
5 sentence four of 42 U.S.C. §§ 405(g).

6 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
7 **DENIED.**

8 The District Court Executive is directed to file this Order,
9 provide copies to counsel for Plaintiff and Defendant, enter
10 judgment in favor of Plaintiff, and **CLOSE** this file.

11 DATED April 20, 2007.

12
13 S/ CYNTHIA IMBROGNO
14 UNITED STATES MAGISTRATE JUDGE
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